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IN THE

Supreme Court of the United States

October Term, 1972

No. .....

NEW HAMPSHIRE BANKERS ASSOCIATION,
MERCHANTS NATIONAL BANK,
AMOSKEAG TRUST COMPANY,
INDIAN HEAD NATIONAL BANK,
BANK OF NEW HAMPSHIRE, N.A.,
KEENE NATIONAL BANK,
STRAFFORD NATIONAL BANK and
THE EXETER BANKING COMPANY,
Petitioners,

v.

JAMES W. NELSON, Bank Commissioner
for the State of New Hampshire, and
WARREN B. RUDMAN, Attorney General
for the State of New Hampshire,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF FOR THE CORPORATE TRUSTEES ASSOCIATION OF WASHINGTON

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The Corporate Trustees Association of Washington, by Lyman W. Hull, its attorney, submits this brief as *Amicus Curiae* under Rule 42(1) of this Court.

STATEMENT OF INTEREST

The Corporate Trustees Association of Washington (hereinafter "the Association") is an unincorporated asso-

ciation composed of eight domestic national banks, one California-based national bank, six state banks and one mutual savings bank, all exercising trust powers. The purposes of the Association are to conduct educational programs for the assistance of the trust staff of member banks, to disseminate information on developments in trust administration and to foster legislation that will provide improved trust services for the public.

All banks which are actually doing a general trust business in the State of Washington are members of the Association which has now been in existence for more than 25 years. Two trust companies not doing a general trust business are not members.

The Association's members have an interest in this action because the statute law of the State of Washington places a restriction on them which is comparable to the provisions of New Hampshire RSA 390:13. The pertinent Washington statute is RCW 30.04.260, which provides as follows:

> "No trust company or other corporation which advertises that it will furnish legal advice, construct or prepare wills, or do other legal work for its customers, shall be permitted to act as executor, administrator or guardian; and any trust company or other corporation whose officers or agents shall solicit legal business *or personally solicit the appointment of such trust company or corporation as executor, administrator or guardian* shall be ineligible for a period of one year thereafter to be appointed executor, administrator or guardian in any of the courts of this state.
>
> Any trust company or other corporation which advertises that it will furnish legal advice, construct or prepare wills or do other legal work for its customers, and any officer, agent or employee of any trust company or corporation who shall solicit legal business

or personally solicit the appointment of such trust company or corporation as executor, administrator or guardian shall be guilty of a gross misdemeanor." [Emphasis Added]

The nature of the penalties has made this statute essentially self-enforcing. No action has ever been known to have been brought for judicial enforcement. Consequently, there has never been a judicial construction of the statute's scope or validity. The Corporate Trustees Association of Washington believes that a determination on the merits of the validity of New Hampshire RSA 390:13 will determine a substantial number of the issues which would be raised by an action for declaratory judgment on RCW 30.04.260.

Therefore, the purpose of this brief is to underscore the importance of issues raised by Petitioners, and to express the deep concern of the Association that the opinion of the Court of Appeals may invite further restraints on the ability of banks in this state to carry out their important fiduciary functions.

ARGUMENT

I. The Issues

The issues to which this Brief will be addressed are:

1. Whether 12 U.S.C. 92a (§1 of Pub. L. 87-722, 76 Stat. 688, Act. of September 28, 1962) authorizes the States to determine the manner in which national banks may seek trust business.

2. Whether the application of RSA 390:13 (and RCW 30.04.260) exclusively to corporate fiduciaries constitutes an arbitrary classification and thus a denial of the equal protection of the law and a denial of due process of the law as guaranteed by the Fourteenth Amendment.

3. Whether there is a public injury flowing from the prohibitions of RSA 390:13 (or RCW 30.04.260).

II. The Position of *Amicus Curiae*

1. *12 U.S.C. 92a Does Not Authorize the ~~Statutes~~ STATES to Determine the Manner in Which National Banks May Seek Trust Business.*

Amicus Curiae take the view that 12 U.S.C. 92a forecloses the states from regulating the manner in which national banks acquire trust business. The Act provides in pertinent part:

> "(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, *when not in contravention of state or local law*, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which state banks, trust companies or other corporations which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located." [Emphasis Added]

The Act further states:

> "(b) Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies or other corporations which compete with national banks, *the granting to and the exercise of such powers by national banks* shall not be deemed to be in contravention of state or local law within the meaning of this act." [Emphasis Added]

The contrary view to ours, that states may prohibit advertising, circularizing or personally soliciting, *or all three*, would permit the states to virtually cripple a federal franchise, namely the right to exercise trust powers under the

authority of the National Banking Act. The issue was clearly resolved against Respondents in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373, 74 S. Ct. 550 (1954).

The opinion of the District Court (336 F. Supp. 1330), as adopted by the Court of Appeals illustrates, perhaps inadvertently, the lack of a valid state reason to justify interference in this aspect of national bank affairs: The District Court concluded that advertising and circularizing were forbidden practices because the New Hampshire Legislature may have thought that "the appointment of an executor should be the result of personal contact and a personal relationship rather than stem from advertising promotions and slogans." (336 F. Supp. at p. 1338). Yet the Washington legislature concluded the opposite for it forbids the bank from initiating personal contact, but does not expressly forbid advertising or circularizing.

Surely, Congressional policy of chartering national banks to engage in trust business is frustrated if they may not make an important segment of their powers known.

The deference paid to state law in 12 U.S.C. 92a relates only to *entry* into the trust field. It clearly renounces that deference in respect to the *exercise* of trust powers. Moreover, the deferential language of 12 U.S.C. 92a should be narrowly construed lest a broad construction lead to a fatal confrontation between federal and state law.

The Court of Appeals has fashioned an entirely new theory of federal-state relationships in the form of an implied state power which supersedes a reservation of federal power. We believe that the Court of Appeals is wrong and

that its decision will confuse the jurisdictional lines between the states and the federal government.

The District Court opinion and the Per Curiam opinion of the Court of Appeals have also erroneously extended the "competitive equality" doctrine of the McFadden Act, (44 Stat. 1228, 12 U.S.C. §36), beyond its proper scope. Drawing on *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S. Ct. 492 (1966), the District Court concludes that Congress was "ever seeking to keep national banks and state banks on the same basis of 'competitive equality'" (336 F. Supp. 1334). This is true only where Congress has expressly chosen a course of deference to state policy. The unequal elements of the dual banking system are numerous. The true historical course and perhaps greatest source of strength and public benefit in the dual banking system has been the game of leap frog played annually between Congress and the state legislatures in innovating powers for their respective institutions.

A truly parallel inquiry to the present case would be whether the McFadden Act authorizes the states to regulate the manner in which national banks solicit business through its branches. Clearly, the express power of the states to determine the establishment of branches does not carry with it the implied power to regulate advertising for business at those branches. *Franklin National Bank of Franklin Square v. New York, supra.*

We think that this case is clearly governed by *Franklin National Bank*, and thus that the Court of Appeals has decided an important federal question in conflict with an applicable decision of this Court.

See also *Davis v. Elmira Savings Bank*, 161 U.S. 275, 16 S. Ct. 502 (1896); *First National Bank of Bay City v. Fellows*, 244 U.S. 416, 37 S. Ct. 734 (1917), *Fidelity National Bank and Trust Company of Kansas City v. Enright*, 264 Fed. 236 (D.C.W.D. Mo., 1920).

2. *The Application of RSA 390:13 (and RCW 30.04.260) Exclusively to Corporate Fiduciaries Constitutes an Arbitrary Classification and Thus a Denial of the Equal Protection of the Law and a Denial of Due Process of Law as Guaranteed by the Fourteenth Amendment.*

There is no discernible public interest which is protected by prohibiting advertising by persons who are trained in probate procedure and administartion and are heavily regulated in performing it, but permitting advertising by persons who are unregulated and untrained. Yet this is the result of RSA 390:13. Logically, if there is to be a state policy on this point it should be the reverse of what now prevails in Washington and New Hampshire.

The blunt effect of RCW 30.04.260 is to prevent a trust officer from addressing a customer (or even the customer's attorney) with the simple request that when the customer draws his will he consider the benefits of naming the bank as executor. The sole and, we submit, arbitrary purpose of this prohibition is to insulate and protect the substantial control already exercised by counsel over the choice of executor. It furthers no other cause. It is "invidious discrimination" which penalizes a constitutionally protected right of expression and hence may not survive unless necessary to protect a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322 (1969). An adjudication of this point by the Court as to RSA 390:13 would substantially resolve the validity of RCW 30.04.260.

3. *There Is a Public Injury Resulting From the Prohibition of RSA 390:13.*

The position of *Amicus Curiae* is that there is a public injury in the prohibitions of RSA 390:13 and its Washington counterpart, RCW 30.04.260. The injury is a denial of ready access to information about a valuable service.

Amicus Curiae believe that the public desires to know the services which may be available to protect and administer their estates for the benefit of their families. The law should accommodate them. The development and expansion of trust services and administrative techniques by corporate fiduciaires is continuous and reflects the increasing complexity of accounting, tax and related aspects of contemporary personal and corporate finance.

The public's lack of understanding about the probate process has been ably demonstrated in recent years through the emergence of "do-it-yourself" probate schemes. A prohibition against advertising by corporate fiduciaries contributes to the lack of understanding and hence to a greater risk of intestacies and unintended dispositions of property. This risk is aggravated during periods of unusually rapid economic growth and population influx as there was in Washington during the 1960's.[1]

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1. During the period 1960-1970 the State of Washington experienced a population growth from 2,853,214 in 1960 to 3,409,169 in 1970. The number of families earning an annual income of $15,000 to $24,999 grew from 23,920 families in 1959 to 157,693 families in 1969; the number of families earning $25,000 or more grew from 8,269 in 1959 to 38,994 in 1969. The median family income in this state grew from $6,225 to $10,407. Source: U. S. Bureau of the Census, *Census of Population 1970, General Social and Economic Characteristics Final Report PC (1)-C49, Washington*, page 49-139.

SUMMARY

The opinion of the Court of Appeals is in direct conflict with *Franklin National Bank of Franklin Square v. New York, supra*, and the plain meaning of 12 U.S.C. 92a and creates serious new questions of jurisdiction between the states and the Federal Government over banks and trust companies. Moreover, there is no suggestion in the record that allowing New Hampshire banks to add the word "executor" to their advertised list of trust services would jeopardize the welfare and safety of the people of that state. Accordingly, we respectfully urge the Supreme Court of the United States to grant certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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